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No. 91-1860

FILED
JUN 23 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DOUGLAS SCOTT MICKEY,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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REPLY TO BRIEF IN OPPOSITION

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June 23, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Rather than acknowledge the obvious need for reconsideration of the judgment below in light of recent authority from this Court, *Sochor* v. *Florida*, No. 91-5843, slip op. (U.S. June 8, 1992); *Stringer* v. *Black*, 112 S. Ct. 1130 (1992),[1] respondent resorts to semantic distortion of the plain meaning of the California death penalty statute. Opp. 12. This tactic is repeated with respect to the second ground advanced in the petition. In respondent's contemplation, when a State's highest court violates an express state statute, the violation is cured by reading

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[1] In addition, this Court has granted certiorari in a third "weighing State" case in which the reviewing court failed either to conduct proper harmless error analysis or to remand for resentencing after determining that one among several aggravating factors had been invalidly referred to the sentencer for consideration in the weighing process. *Richmond* v. *Lewis*, No. 91-7094, *cert. granted*, 112 S. Ct. 1557 (Mar. 30, 1992).

into the statute an "implicit" term excusing the violation. Opp. 17.

The petition sought to lay bare for this Court's scrutiny the "jurisprudence of slogans" that the court below substituted for the careful harmless error analysis required by the Eighth Amendment. Pet. 21. Respondent substitutes a jurisprudence of fictions that falls no closer to the constitutional mark.

1. The short answer to respondent's claim that the petition confuses the "special circumstances" and "aggravating factors" features of California's death penalty statute is that the statute itself conclusively demonstrates otherwise.[2] Section 190.3 of the California Penal Code provides that

> In determining the penalty, the trier of fact *shall* take into account any of the following factors, if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding *and the existence of any special circumstances found to be true pursuant to Section 190.1.*

Cal. Penal Code § 190.3 (Deering 1985) (emphasis added). Thus, a California "special circumstance" finding is used for two purposes, initially to determine death eligibility and then as an aggravating factor to be considered in determining the particular penalty to be imposed. That being the case, respondent fails in its attempt to diminish the constitutional significance of the invalid special circumstances and thereby to distinguish this case from *Stringer* v. *Black*.

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[2] As the statute also indicates, the terms "circumstances" and "factors" may be used interchangeably. As observed in the petition, the jury was instructed pursuant to § 190.3(a) to "be guided by the applicable *factors* of *aggravating and mitigating circumstances*" upon which they had been instructed. Pet. 16-17 & n.8. (emphasis added).

Respondent also misreads the statutory provision quoted above in claiming that the jury's invalid special circumstance findings "have no independent significance" in the penalty determination because the jury merely "*may* consider them under § 190.3(a)." Opp. 12 (emphasis added). The statute's language, however, is quite obviously mandatory—"the trier of fact *shall* take into account any of the following factors"—rather than permissive in the manner respondent suggests. Cal. Penal Code § 190.3. To be sure, the jury was not told what weight to assign to the invalid special circumstance findings when it determined whether the balance of aggravating versus mitigating factors pointed to life or to death. But irrefutably the jury was required to include *every one* of the tainted special circumstances in its calculation of the total weight of the aggravating evidence against which the mitigating evidence was to be weighed.[3]

Nor is respondent successful in attempting to distinguish this case from *Stringer* by asserting that "special circumstances do not have the same significance in California's statutory scheme that aggravating factors have under Mississippi law." Opp. 12. Respondent's purported distinction between the Mississippi death penalty statute and the analogous California statute reflects more a difference in vocabulary than a difference in process.[4]

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[3] *See* 5 CT 1445 (written instruction to the jurors that "You shall consider, take into account . . . the existence of any special circumstance(s) found to be true"); *id.* at 1456, 1469 (written instruction, given twice, that "you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" and "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death").

[4] In Mississippi, for example, a defendant is not "death eligible" unless he is convicted of "capital murder," of which there are seven forms, including murder "in the commission of the crime of . . . burglary [or] robbery." Miss. Code Ann. § 97-3-19(2)(a-g) (West 1991). This "capital offense" criterion under Mississippi law is virtually identical to the California "special circumstance" of "mur-

The California Supreme Court itself has repeatedly recognized the significance of special circumstance findings under § 190.3(a) and their role in the weighing process. See *People* v. *Hamilton*, 774 P.2d 730, 753 (Cal. 1989) (quoting § 190.3(a) and emphasizing the provisions which mandate the jury's consideration of its special circumstance findings as aggravating factors), *cert. denied*, 494 U.S. 1039 (1990); *People* v. *Melton*, 750 P.2d 741, 774-75 (Cal.) (special circumstance findings are to be weighed by the jury in determining sentence), *cert. denied*, 488 U.S. 984 (1988). Respondent's claim that the jury's special circumstance findings have no "independent significance" is also belied by the statutory requirement of § 190.1 of the Penal Code, whereby the jury returns a guilt-phase verdict form that identifies in writing its special circumstance findings. 5 CT 1340-43, 1345-48. There could hardly be a more dramatic way of highlighting these findings of fact as aggravating factors bearing particular significance in the jury's subsequent penalty determination.

Finally, neither respondent's blustering about the distinction between "special circumstances" and "aggravating factors," nor the relatively large amount of argument space dedicated to this discussion, should distract this Court from the fact that, as conceded by respondent, some "aggravating evidence" was improperly admitted in this case. Opp. 14. The sentencer here, as in *Stringer* and *Sochor*, was ordered by the trial court to consider certain aggravating evidence determined on appeal to be invalid. Pet. 20-21. The erroneous inclusion of this evi-

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der . . . committed while the defendant was engaged in [the felony of robbery or burglary]." Cal. Penal Code § 190.2(17) (Deering 1985). In both Mississippi and California, the same act which formed the basis for the conviction of the capital crime of murder during the commission of a felony (or for the finding of the equivalent special circumstance) is also considered an "aggravating circumstance" that the jury is statutorily required to weigh before it chooses a particular sentence. Miss. Code Ann. § 99-19-101(3), (5)(d) (West 1991); Cal. Penal Code § 190.3(a).

dence in the weighing of life or death undercut the individualized reliability of the capital sentencing process established by state law pursuant to the dictates of the Eighth Amendment. The resulting sentence can stand absent reweighing only if the invalid aggravating evidence was *harmless beyond a reasonable doubt.* See *Sochor*, slip op. at 4; *Stringer*, 112 S. Ct. at 1140; see also *Parker* v. *Dugger*, 111 S. Ct. 731, 738 (1991) (reviewing court in a weighing state must reweigh or conduct a harmless error analysis).

Respondent is content to observe that the California Supreme Court has "consistently found" no error "[w]here no additional evidence was admitted to prove the special circumstances and the prosecutor did not inflate their significance in the weighing process," and then explains that the California Supreme Court followed this "usual practice" here. Opp. 13. This "automatic assumption" that the invalidated aggravating factors did not infect the weighing process is exactly the type of appellate standard that this Court declared improper in *Stringer*, 112 S. Ct. at 1137. The Constitution instead requires a "thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Id.* Yet the California Supreme Court's "usual practice" ignores completely the role that the particular invalidated aggravating circumstances played in the case at bar and thus violates the "dual constitutional criteria of precise and individualized sentencing." *Id.*; see also *Sochor*, slip op. at 4; *Clemons* v. *Mississippi*, 494 U.S. 738, 752 (1990).

Furthermore, the conditions imposed by the California Supreme Court in engaging in its "usual practice" of affirmance are themselves inadequate to protect petitioner's Eighth Amendment rights. The "no additional evidence" condition ignores the simple fact that the jury had before it in the penalty phase all evidence introduced to support the invalid special circumstance findings when it weighed that evidence in determining sentence. The

court's further reliance on the fact that the prosecutor did not "inflate" the significance of the special circumstance findings is meaningless and says nothing about how "significant" those findings might have been to the jury's sentencing decision in this particular case.

In order to conform to *Chapman* v. *California*, 386 U.S. 18 (1967), the California Supreme Court had to find beyond a reasonable doubt that, in deciding upon the death sentence, the jury could not have been influenced by any of the invalid aggravating factors. See *Yates* v. *Evatt*, 111 S. Ct. 1884, 1892-94 (1991); see also *Sochor*, slip op. at 1 (Rehnquist, C.J., concurring and dissenting); *Barclay* v. *Florida*, 463 U.S. 939, 958 (1983) (opinion of Rehnquist, J.).[5] The California Supreme Court's improper reliance on its "consistent findings" in lieu of any *individualized* analysis of the influence of the invalid aggravating factors warrants vacation of the death sentence imposed here and a remand for proceedings in accord with *Stringer* and *Sochor*.[6]

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[5] Respondent suggests that the California state law standard for determining whether penalty phase error requires reversal—the standard of a "reasonable possibility" that the error caused prejudice—is functionally the same as the "harmless beyond a reasonable doubt" standard for federal constitutional error propounded by *Chapman*. Opp. 13, n.2. Respondent fails to pay due regard to this Court's recent discussion of the proper application of *Chapman* in *Yates*, 111 S. Ct. at 1892-97. The Court there made it clear that the issue to be answered under *Chapman* is not what the jury might have determined had the trial been error-free, but what weight the jury gave to the evidence it was asked to consider in light of the "customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so." *Id.* at 1893. While the "overwhelming" probative strength of properly admitted evidence may suffice to establish beyond a reasonable doubt that evidentiary error caused no harm, *Yates* makes clear that this is a conclusion to be reached with great caution. *Id.*

[6] Even if the California Supreme Court's "harmless error" ruling could be considered a "principled explanation of how the court reached that decision," see *Sochor*, slip op. at 1 (O'Connor, J., con-

2. With respect to the second question presented in the petition—whether the California Supreme Court's *sua sponte* declarations of procedural default and subsequent refusal to grant rehearing violated petitioner's due process rights—respondent does not contest petitioner's central claim that he cannot be deprived of his liberty or his life without faithful compliance by state courts with their duties under state appellate procedure. Instead, respondent claims that the California Supreme Court's four-word order ("Petition for rehearing [d]enied," Pet. App. 98a) deprives this Court of jurisdiction to decide that petitioner's fully briefed and argued federal law claims were procedurally defaulted in violation of state law. Opp. 16. Recognizing that the court below gave no reason, let alone an adequate and independent reason, for denying rehearing of petitioner's procedurally defaulted federal claims, respondent seeks to justify the non-compliance below with § 68081 by the astonishing assertion that, implicitly, the California Supreme Court must have decided that § 68081 was simply inapplicable when the issue to be reconsidered was a *sua sponte* procedural default. Opp. 17.

Respondent's argument disregards this Court's "adequate and independent state ground" rulings. In *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) and more recently in *Coleman* v. *Thompson*, 111 S. Ct. 2546, 2557 (1991), this Court held that, on direct review of state court judgments and on habeas review of federal claims, a federal court will presume that there is no independent and adequate state ground when the state court decision fairly appears to be "interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." As noted, respondent does not contest petitioner's

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curring), the court's reliance upon its "consistent findings" rather than the particular facts of this case remains fundamentally contrary to this Court's frequent explanations of what an adequate harmless error analysis entails.

claim that he has a federal due process interest in the state's adherence to its own appellate procedures (see Pet. 23) and that federal concerns are also directly implicated by the federal nature of the procedurally defaulted claims. Thus, respondent cannot claim that the denial of rehearing did not directly implicate federal concerns. Nor is the adequacy or independence of any state law ground for denying rehearing apparent from the preemptory order denying rehearing. Respondent's claim that the four-word order denying rehearing constitutes an "implicit determination" of the inapplicability of § 68081 is antithetical to this Court's well-established requirements for articulation of an adequate and independent state ground. See *Coleman*, 111 S. Ct. at 2559 (a state court should "express plainly, in every decision subject to federal review, the grounds upon which its judgment rests").

Even assuming that such an "implicit determination" could be cognizable as an independent state ground, the plain language of § 68081 reveals that respondent's invented ground would be wholly inadequate even if expressly articulated. The statute provides that

> Before the Supreme Court . . . renders a decision in a proceeding . . . based upon *an issue* which was not proposed or briefed by any party to the proceeding, the court *shall* afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing *shall* be ordered upon timely petition of any party.

Cal. Gov't Code § 68081 (Deering 1992) (emphasis added); Pet. 3.

The plain language of this statute admits of no distinction between "procedural default" decisions and other decisions on the issues presented by the parties. The mandatory character of the language used does not afford the court any discretion to determine what *sua sponte*

decisions it might exempt from the straightforward and broad operation of the statute. Moreover, no caselaw supports an exemption of procedural default decisions, or any other procedural decisions, from the operation of § 68081.[7] This novel interpretation of California's procedural requirements cannot be permitted to thwart review in this Court. *NAACP* v. *Alabama*, 357 U.S. 449, 457 (1958).

Moreover, respondent's argument proves too much. Respondent's theory is that the failure of the court below to grant the rehearing must *ipse dixit* mean that the court below construed § 68081 so as to condone the denial of a rehearing. Because the true meaning of § 68081 is a question of state law, respondent concludes, this Court must accept whatever implicit construction of § 68081 will validate its application by a state court. Opp. 17. If this argument were true, no application of state law could be unconstitutionally arbitrary within the rule of *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980), unless, as in *Hicks*, the State is candid enough to admit that it has acted illegally under state law.

Principles of federalism indeed require respect for state court constructions of state statutes, but those same principles require that state courts administer state law nonarbitrarily. Certainly in the circumstances presented here—where the interest impaired by an arbitrary appli-

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[7] Judicial constructions of § 68081 only support petitioner's claim that he has a due process interest in presenting argument to the court on the issue of whether he preserved his federal constitutional claims at trial. *See, e.g., Adoption of Alexander S.* v. *Tudor*, 750 P.2d 778, 783 (Cal. 1988) (court of appeal has a "duty upon timely request to allow supplemental briefing [or grant rehearing] before it renders a decision which was not proposed or briefed by any party); *Schneider* v. *Kaiser Found. Hosps.*, 264 Cal. Rptr. 227, 229 n.2 (Cal. Ct. App. 1989) (rationale for § 68081 "is to assure that the parties have the opportunity to present relevant argument to the court based on a fair understanding of the facts and issues which will serve as the foundation for the court's decision").

cation of state law is the very life of the petitioner, where the state law in question is an express, mandatory and unambiguous statute, and where the subject of the state statute is protection of a litigant's procedural rights —this Court must have jurisdiction to determine whether the denial of rehearing below was so far at odds with the prescribed state procedure as to constitute, in its most literal sense, a departure from "due" process of law. See *Hewitt* v. *Helms*, 459 U.S. 460, 473 (1983) ("use of explicitly mandatory language" in state-law definition of an important procedural right can support the "conclusion that the State has created a protected liberty interest"). See also *Howlett* v. *Rose*, 110 S. Ct. 2430, 2446 (1990) ("The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction' "). The California Supreme Court's rejection of petitioner's timely rehearing request without any explanation was therefore an arbitrary deprivation of petitioner's federal due process rights. *Hicks*, 447 U.S. at 346. Accordingly, remand is warranted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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